

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 74154-41B BY FREDERICK L.)	
JOHNSON)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the October 9, 1990, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 74154-41B is hereby granted to Frederick L. Johnson to appropriate 600 gallons per minute up to 169.6 acre-feet per year of groundwater by means of a well for supplemental sprinkler irrigation purposes from April 1 to October 15, inclusive of each year. The place of use shall be 95 acres in the NE $\frac{1}{4}$, 80 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$, and 65 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 33, Township 7 South, Range 9 West, in Beaverhead County.

A. This permit is subject to all prior and existing water

rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

B. This permit is subject to § 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of the well must include an access port of at least .50 inch so that the static water level in the well may be accurately measured.

C. This permit is issued in conjunction with Permits No. 14559-41B and 22712-41B. The combined appropriation as granted shall not exceed a total of 2205 gallons per minute up to 581 acre-feet of water per year.

D. The Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all water diverted, including the period of time and shall submit said records to the Helena Water Resources Field Office upon demand and no later than November 30 of each year.

E. The Permittee shall take static water level measurements on April 15 and November 15 of each year. The Permittee shall keep a written record of these measurements and submit them by


November 30 of each year to the Helena Water Resources Field Office, 1520 E. 6th Avenue, Helena MT 59620-2301.

F. Issuance of this Permit shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing the Permit, acknowledge any liability for damages caused by the exercise hereof even if such damages are a necessary and unavoidable consequence of same.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 7 day of November, 1990.


Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 8th day of November, 1990 as follows:

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Mike Zimmerman
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Neal and Jamie Davis
2475 Hwy 278
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Laden Ranch
1125 Laden Lane
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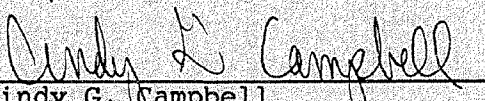
Tash T. Diamond Livestock,
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William Uthman, Geohydrologist
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Cindy G. Campbell
Hearings Unit Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	PROPOSAL FOR DECISION
NO. 74154-41B BY FREDERICK L.)	
JOHNSON)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on August 29, 1990, in Dillon, Montana.

Applicant Frederick L. Johnson appeared at the hearing by and through Ronald W. Johnson who was represented by counsel Ted J. Doney.

Objectors Neal and Jamie Davis appeared at the hearing pro se.

Objector Laden Ranch appeared by and through Tim Laden.

Objector Tash T. Diamond Livestock, Inc., hereafter Objector Tash, appeared by and through William T. Tash.

Objector Montana Power Company did not appear at the hearing and had contacted the Hearing Examiner by telephone on August 27, 1990, stating that it was withdrawing its objection to this Application.

William Uthman, Hydrogeologist with the Department of Natural Resources and Conservation, hereafter Department, appeared at the hearing as a staff expert witness.

Jim Beck, Agricultural Specialist with the Department, appeared as a staff expert witness.

EXHIBITS

Applicant's Exhibit 1 is a hand-drawn map of the north half of Sections 32 and 33, Township 7 South, Range 9 West. The green area on the map is the proposed place of use. The pink lines are water delivery lines. The production well is marked by a large blue dot and is identified as "150 HP Pump" in black ink on yellow. The test well is marked by a small blue dot just above the production well location. This Exhibit was received into the record without objection.

Applicant's Exhibit 2 consists of three pages. The first page is a list of measurements taken at the Johnson test well since 1978. The other two pages are measurements taken at the Johnson test well in June, July, and August of 1990. Tash objected to this Exhibit becoming part of the record, challenging the validity of the measurements taken in 1978 to 1983 stating there was a metal plate welded onto the top of the casing of this well during this period. Applicant explained there was a corner clipped off the plate and that he was able to measure through that opening. Objection was overruled.

Objectors Davis' Exhibit 1 is a photocopy of a Certificate of Water Right issued to Neal and Jamie Davis. This Exhibit was accepted into the record without objection.

Objectors Davis' Exhibit 2 is a document entitled "Davis Well Measurements". It has measurements taken on three different days, the depth to the water, and the depth of water in well. This Exhibit was accepted into the record without objection.

Objectors Davis' Exhibit 3 is a photograph showing the Applicant's sprinkler in action. The photograph was introduced as proof of waste. Applicant objected on the grounds of relevancy. Objectors argued relevancy in that one of the criteria for issuance of a permit is beneficial use and the act of wasting water is not beneficial. Applicant explained that the switch on the end gun had "gone out" and had to be replaced. Exhibit was allowed into the record but not as proof of waste.

Objectors Davis' Exhibit 4 is a photocopy of three photographs of trees on their property to illustrate their allegation that their trees were dying. Objectors Davis had the original photographs at the hearing. This Exhibit was accepted into the record without objection.

Objector Tash's Exhibit 1 is a photograph taken June 13, 1990, of a waterway which Objector Tash called Rattlesnake Slough.

Objector Tash's Exhibit 2 is a copy of a letter to Ron Johnson from Jim Beck. A portion of this letter is highlighted in yellow.

Objector Tash's Exhibit 3 is a photograph of the butterfly valve in the delivery line of the Applicant's irrigation system.

Objector Tash's Exhibit 4 is a photograph of a pressure gauge next to the butterfly valve.

Objector Tash's Exhibit 5 is a photograph of an electric meter.

All of Objector Tash's Exhibits were entered into the record without objection.

All parties had opportunity to review the Department file. There were no objections to any part of the file, therefore it is included in the record in its entirety.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Frederick L. Johnson filed the above-entitled Application with the Department on March 16, 1990, at 10:43 a.m.

3. Pertinent portions of the Application were published in the Dillon Tribune, a newspaper of general circulation in the area of the source, on April 24, 1990.

4. Ronald W. Johnson testified that the Applicant is his brother and that he (Ron) has the authority to speak on Frederick L. Johnson's behalf. The Applicant owns the proposed point of diversion. The proposed place of use is owned by the Applicant and Ronald W. Johnson. (Testimony of Ronald W. Johnson and Department file.)

5. The Applicant proposes to appropriate groundwater at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, Township 7 South, Range 9 West, Beaverhead County, by means of a well. The water would be pumped at a rate of 600 gallons per minute (gpm) up to 169.6

acre-feet per year for irrigation purposes on 240 acres from April 1 to October 15, inclusive of each year. The proposed use would be in conjunction with Permit No. 14559-41B which allows the Applicant to appropriate 1,205 gpm up to 339.2 acre-feet of groundwater per year for irrigation of 175 acres. Permit No. 22712-41B allows the Applicant to appropriate 405 gpm up to 151 acre-feet of groundwater per year.

Originally, Permit No. 22712-41B authorized appropriation of groundwater at a rate 1,795 gpm up to 200 acre-feet per year for irrigation on 160 acres and Permit No. 14559-41B authorized appropriation of groundwater at a rate of 2.70 cfs up to 450 acre-feet for irrigation of 200 acres. However, since the water rights established are limited to the actual use, verification of those permits revealed the water use as stated above. (Testimony of Ronald W. Johnson, Department file and Department records.)

6. The well was completed on October 23, 1977 and has been in use since 1978. The original 100 horsepower pump had the capability to pump approximately 1,600 gpm. A new 150 horsepower pump with a capacity of 1,800 gpm was installed in 1982. Applicant has been using the water at a rate of 1,300 gpm up to 581 acre-feet per year since 1982. This application was filed to cover water use in excess of the water rights established. (Testimony of Ronald W. Johnson and Department file.)

7. Applicant has kept records of the static water level in the Johnson test well since 1978. In 1978 the water level was

8.0 feet. The lowest level, 8.6 feet, was on November 24, 1979, and the highest water level, 6.2 feet, was measured on July 28, 1984. (Applicant's Exhibit 2.)

8. A 24-hour aquifer test at the production well was conducted by William Uthman and Jim Beck on June 5 and 6 of 1990. The purpose of the test was to determine the hydraulic properties of the aquifer and to quantify any impacts caused by pumping. During this test several wells were monitored for changes in the water levels. These wells and their distances from the production well are: the Unruh well 350 feet to the north, a shallow sandpoint well 30 feet to the west, a shallow sandpoint well 75 feet to the west, a shallow sandpoint well 45 feet to the north, a Bureau of Reclamation well 150 feet to the southeast, Laden's irrigation and observation wells approximately 3,950 feet to the west, and the Peterson well approximately 1,500 feet to the east.

During the test, the water levels in the shallow sandpoint wells showed negligible effects, .02 to .03 of a foot. The Laden well actually had a slight rise in the water level. This indicates the sandpoints were installed in a shallow aquifer system overlying a thick, very effective, confining unit. The Applicant's well is finished under this confining impervious layer. Changes shown in the monitoring wells were so slight, that any change could not be definitely attributed to the pumping of the Applicant's well. The change could be merely regularly occurring fluctuation.

Using the worst case scenario, continuous pumping for 63.6 days, the predicted drawdown in Objector Tash's well would be approximately 0.90 feet and in the Davis' well, 0.60 feet. In reality, pumping would not be continuous for 63.6 days. The drawdowns predicted in a more realistic scenario, 15 days of continuous pumping, are 0.65 feet in the Tash well and 0.40 feet in the Davis well.

Mr. Uthman concluded from the data gathered during the aquifer test that the hydraulic properties are most favorable for producing and sustaining large groundwater appropriations with virtually no potential for groundwater-surface water interaction. He also concluded that there is a diminishment in baseflow accretions to the Beaverhead River, however this diminishment is imperceptible. (Testimony of William Uthman.)

9. The Department file contains two reports written by Mr. Uthman. One is dated May 16, 1990 and the other is dated July 31, 1990. Parts of these reports appear to be inconsistent. Mr. Uthman readily agreed this is so and by way of explanation, stated the first report was written before the aquifer test when he did not have the information that was available as a result of the aquifer test. (Testimony of Mr. Uthman and Department file.)

10. Objectors Davis have Certificate of Water Right No. 65292-41B for a domestic well located approximately one mile from Applicant's production well. Mr. Davis testified that their trees are dying and that the County Extension Agent attributed the loss to lack of water. Objectors Davis believe the trees are

dying because the water level in the aquifer is diminishing, largely due to the number of irrigation wells developed in the area. Mr. Davis stated that while their trees are dying, Laden Ranch's trees, which are nearby, are not because Laden irrigates them. (Testimony of Neal and Jamie Davis and Objectors Davis' Exhibit 4.)

Objectors Davis have taken measurements of the static water level in their domestic well on three occasions; March 10, 1987; April 25, 1989; and April 13, 1990. The static water level on March 10, 1987, was 15.0 feet. On April 25, 1989, the static water level was 17.2 feet. The final measurement of the static water level on April 13, 1990, was 20.4 feet. (Testimony of Neal and Jamie Davis and Davis' Exhibit 2.)

11. Objector Tash has nine Water Right Claims before the Water Court. Three of the Claims are for water use from Van Camp Spring also known as Downing Spring and one is for water use from a slough which captures waste water from Van Camp Spring. The remaining Water Right Claims are for surface water: three claim water from the Beaverhead River, one claims water from Van Camp Slough, and one claims water from Dory Creek. (Department records.)

Objector Tash introduced a photograph dated June 13, 1990, of an area he called Rattlesnake Slough. (Tash Exhibit 1.) The slough was dry except for a small puddle beyond the animal tracks. Mr. Tash stated Rattlesnake Slough had been dry only one other time to his knowledge and that was during the pumping and

discharging of water from the Allred Pit. This year there was no water in the slough except what Tash had ordered from its river allotment.

Objector Tash's objections are based on the interference to prior senior rights even though it is unquantifiable and can't be measured it does result in a net loss to the river system. Objector Tash argued that collectively the groundwater appropriations do have an impact, it is the 'preponderance' of drawdown of the aquifer that results in a net loss. Mr. Tash also stated Tash's objections would be resolved if there were legislative remedies to prioritize groundwater development on the same basis as surface water. Tash feels this is absent and until such time that legislative amendments can correct that situation, accurate measurements to determine how much drawdown there is on these groundwater developments are most imperative. Testimony of William Tash.

11. The Rattlesnake Creek area has been experiencing drought conditions for the last several years. There is no doubt the drought is the reason there is a shortage of water. Testimony of William Tash.

12. The Helena Water Resources Field Office recommends the conditions proposed in the Notice and Statement of Intent signed by Jim Beck on March 25, 1997, and by Ronald W. Johnson on March 29, 1997 be imposed on the Permit if issued for this application. Mr. Beck stated that the second proposed condition should be converted so that the total gallons per minute should

be 2205 instead of 2200. The volume in that condition was based on the Checksheet for Irrigation Flow and Volume in the file. An analysis was made of the water requirements needed for the proposed acreage in that area. The volume was calculated from that analysis. (Testimony of Jim Beck.)

14. Department records revealed no planned uses or developments for which a permit has been issued, nor any planned uses or developments for which water has been reserved, that may be adversely affected by the proposed project. Application for Beneficial Water Use Permit No. 71925-41B by Ronald W. Johnson is pending. A hearing has been held but the record is still open for additional evidence. Ronald W. Johnson is the manager of the Applicant's agricultural enterprise, therefore would not intentionally create a problem for himself by this project.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein and over the parties hereto. Title 85, chapter 2, part 3, MCA.

2. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

3. The Department must issue a Provisional Permit if the Applicant proves by substantial credible evidence that the following criteria, set forth in § 85-2-311, MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

...

(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use of water, irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 5 and 6.

Throughout the hearing, there were many comments concerning the "illegal" use since 1982. The Hearing Examiner does not condone such actions, however that was not the issue at this hearing and was not properly before the Hearing Examiner. The Hearing Examiner incorporated that fact into this Proposal only because that use provides further evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

6. The Applicant has possessory interest in the proposed place of use. See Finding of Fact 4.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 14.

8. There are unappropriated waters in the source of supply at the point of diversion, at times when the Applicant can use it, in the amount requested throughout the proposed period of appropriation. See Findings of Fact 6, 7, and 8.

9. There is substantial credible evidence that the water rights of a prior appropriator will not be adversely affected. See Finding of Fact 8.

Although groundwater and surface water are interconnected as a single hydrologic system, the loss of baseflow accretion to the

Beaverhead River system is imperceptible. See Finding of Fact 8. Groundwater over-appropriation, in the absence of long term records, cannot be interpreted from low stream flows and declines in the shallow water table when those observations were taken during a drought period. See Finding of Fact 12.

Objectors Davis presented evidence that the water level in their domestic well had declined. See Finding of Fact 10. However, the record does not indicate whether the pump was active before or during the measuring process or if the pump had been idle for a period of time before the measurements. Measurements taken while the pump is running or immediately after the pump stops will be inaccurate. The Davis well would experience little effect as a result of pumping the Johnson well. See Finding of Fact 8.

There is conclusive evidence in the record that the shallow aquifer is not affected by withdrawing water from the lower aquifer, the source of supply for this Application. There is evidence that the effects of withdrawing water from the lower aquifer would be minimal. See Finding of Fact 8. There is no evidence that water levels in the lower aquifer have declined. There is, in fact, evidence that water levels in the lower aquifer appear to have remained constant. Records kept on the Johnson test well indicate stable static water levels with minor seasonal fluctuations. See Finding of Fact 7.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 74154-41B is hereby granted to Frederick L. Johnson to appropriate 600 gallons per minute up to 169.6 acre-feet per year of groundwater by means of a well for supplemental sprinkler irrigation purposes from April 1 to October 15, inclusive of each year. The place of use shall be 95 acres in the NE $\frac{1}{4}$, 80 acres in the E $\frac{1}{2}$ NW $\frac{1}{4}$, and 65 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 33, Township 7 South, Range 9 West, in Beaverhead County.

A. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

B. This permit is subject to § 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of the well must include an access port of at least .50 inch so that the static water level in the well may be accurately measured.

C. This permit is issued in conjunction with Permits No. 14559-41B and 22712-41B. The combined appropriation as granted

shall not exceed a total of 2205 gallons per minute up to 581 acre-feet of water per year.

D. The Permittee shall install an adequate flow metering device in order to allow the flow rate and volume of water diverted to be recorded. The Permittee shall keep a written record of the flow rate and volume of all water diverted, including the period of time and shall submit said records to the Helena Water Resources Field Office upon demand and no later than November 30 of each year.

E. The Permittee shall take static water level measurements on April 15 and November 15 of each year. The Permittee shall keep a written record of these measurements and submit them by November 30 of each year to the Helena Water Resources Field Office, 1520 E. 6th Avenue, Helena MT 59620-2301.

F. Issuance of this Permit shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing the Permit, acknowledge any liability for damages caused by the exercise hereof even if such damages are a necessary and unavoidable consequence of same.


NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception

filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 9th day of October, 1990.


Vivian Lighthizer, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their addresses this 10th day of October, 1990, as follows:

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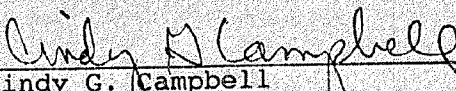
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Hearing Unit Secretary